United States Court of Appeals

for the Second Circuit

RESPONDENT’S BRIEF

76-4169

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ROBERT HALTMIER,

Petitioner,

v.

COMMODITY FUTURES TRADING COMMISSION,

Respondent.

On Petition for Review of an Order of the
Commodity Futures Trading Commission

BRIEF OF THE COMMODITY FUTURES TRADING COMMISSION, RESPONDENT

B
P/S

HOWARD SCHNEIDER
General Counsel

RICHARD E. NATHAN
Deputy General Counsel

FREDERIC T. SPINDEL
Associate General Counsel

JEFFREY J. MILTON
Attorney

Commodity Futures Trading
Commission
2033 K Street, N.W.
Washington, D.C. 20581

<u>INDEX</u>

<u>Page</u>

CITATIONS ii

COUNTERSTATEMENT OF THE ISSUES PRESENTED 1

PRELIMINARY STATEMENT 2

COUNTERSTATEMENT OF THE CASE 5

The Nature of the Administrative Proceeding Below 5
The Evidence of Mr. Haltmier's Unauthorized Trading in Commodity Futures 8
The Commission's Decision 17

STATUTE INVOLVED 18

ARGUMENT 19

I. PETITIONER WILLFULLY VIOLATED THE ANTIFRAUD PROVISIONS OF THE COMMODITY EXCHANGE ACT BY ENGAGING IN UNAUTHORIZED COMMODITY FUTURES TRADING FOR THE ACCOUNT OF HIS CUSTOMER; MINOR ERRORS IN THE COMMISSION'S DECISION WERE NOT MATERIAL OR PREJUDICIAL 19

II. THE REMEDIAL SANCTIONS IMPOSED UPON PETITIONER WERE WELL WITHIN THE COMMISSION'S DISCRETION 28

III. MR. HALTMIER WAS AFFORDED A FAIR AND IMPARTIAL HEARING BEFORE THE COMMISSION; NO BIAS OR PREJUDGMENT WAS EVIDENT NOR WAS MR. HALTMIER OTHERWISE PREJUDICED IN THE ADMINISTRATIVE PROCEEDING 38

CONCLUSION 43

SCHEDULE S-1

CITATIONS

Page

Cases:

Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972) 19

Elliott Alkow, 31 A.D. 1353 (1972) 19

American Power & Light Co. v. SEC, 329 U.S. 90 (1946) 29

Armstrong-Jones & Co. v. SEC, 421 F.2d 359 (C.A. 6), cert. denied, 398 U.S. 958 (1970) 31

George Rex Andrews, 32 A.D. 553 (1973) 19

Arrow Metal Products Corp. v. FTC, 249 F.2d 83 (C.A. 3, 1957) 31

Associated Securities Corp. v. SEC, 293 F.2d 738 (C.A. 10, 1961) 33, 35

Belsinger v. District of Columbia, 295 F. Supp. 159 (D.D.C., 1969), rev'd on other grounds, 436 F.2d 214 (C.A. D.C., 1970) 38

Booth v. Peavey Co. Commodity Services, 430 F.2d 132 (C.A. 8, 1970) 20

Braniff Airways, Inc. v. CAB, 379 F.2d 453, (C.A. D.C., 1967) 27

Butz v. Glover Livestock Comm'n, Inc., 411 U.S. 182 (1973) 29, 32

Cargill, Inc. v. Hardin, 452 F. 2d 1154 (C.A. 8, 1971) cert. denied, 406 U.S. 932 (1972) 21

CFTC v. J.S. Love & Assoc. Options, Ltd., CCH Comm. Fut. L. Rep. ¶20,198 (S.D.N.Y, 1976) 31

Communist Party v. Control Board, 367 U.S. 1 (1961) 27

Continental Box Co. v. NLRB, 113 F.2d 93 (C.A. 5, 1940) 38

Converse v. Udall, 262 F. Supp. 583 (D. Ore. 1966), aff'd 399 F.2d 616 (C.A. 9, 1968), cert. denied, 393 U.S. 1025 (1969) 38

Page

Cases (continued):

Coyle v. Gardner, 298 F. Supp. 609 (D. Hawaii 1969) 41

Dlugash v. SEC, 373 F.2d 107 (C.A. 2, 1967) 32

Eastern Produce Co. v. Benson, 278 F.2d 606 (C.A. 3, 1960) 24, 29, 31, 33

FTC v. Universal-Rundle Corp., 387 U.S. 244 (1967) 30, 32

FTC v. WOKO, 329 U.S. 223 (1946) 32

Fink v. SEC, 417 F.2d 1058 (C.A. 2, 1969) 31, 34

G.H. Miller & Co. v. United States, 260 F.2d 286 (C.A. 7, 1958), cert. denied, 359 U.S. 907 (1959) 20, 29, 30, 32, 33

General Foods Corp. v. Brannan, 170 F.2d 220 (C.A. 7, 1948) 20

George Steinberg and Son, Inc. v. Butz, 491 F.2d 988 (C.A. 2), cert. denied, 419 U.S. 830 (1974) 24

Gold v. Secretary of HEW, 463 F.2d 38 (C.A. 2, 1972) 41

Goodman v. Benson, 286 F.2d 896 (C.A. 7, 1961) 21, 24, 29

Great Western Food Distributors, Inc. v. Brannan, 201 F.2d 476 (C.A. 7), cert. denied, 345 U.S. 997 (1953) 20, 29

Gross v. SEC, 418 F.2d 103 (C.A. 2, 1969) 30, 34

Rodger Harris, 29 A.D. 1330 (1970) 19

Hecht v. Harris, Upham & Co., 283 F. Supp. 417 (N.D. Cal. 1968), modified on other grounds, 430 F.2d 1202 (C.A. 9, 1970) 19, 20

Hendrix Mfg. Co. v. NLRB, 321 F.2d 100 (C.A. 5, 1963) 39

Hiller v. SEC, 429 F.2d 856 (C.A. 2, 1970) 32

Page

Cases (continued):

Jaffee & Company v. SEC, 446 F.2d 387 (C.A. 2, 1971).. 25

J. Logan & Co., 41 S.E.C. 88 (1962), aff'd per curiam sub. nom. Hersh v. SEC, 325 F.2d 147 (C.A. 9, 1963), cert. denied, 377 U.S. 937 (1964).. 20

Johnson v. Arthur Espey, Shearson, Hammil & Co., 341 F. Supp. 764 (S.D. N.Y., 1972).............. 20

Kent v. Hardin, 425 F.2d 1346 (C.A. 5, 1970)......... 20, 32

Lawrence v. SEC, 398 F.2d 276 (C.A. 1, 1968)......... 31

McCurnin v. Kohlmeyer & Co., 340 F. Supp. 1338 (E.D. La., 1972), aff'd 477 F.2d 113 (C.A. 5, 1973).. 20

Moog Industries, Inc. v. Federal Trade Commission, 355 U.S. 411 (1958).............................. 30

Myers v. Bethlehem Ship Building Corp., 303 U.S. 41 (1958).. 35

NLRB v. Dennison Mfg. Co., 419 F.2d 1080 (C.A. 1, 1969), cert. denied, 397 U.S. 1023 (1970)........ 38

NLRB v. Ebner Bros. Packers, 364 F.2d 565 (C.A. 5, 1966).. 40

NLRB v. Pittsburgh Steamship Co., 337 U.S. 656 (1948).. 40

Nees v. SEC, 414 F.2d 211 (C.A. 9, 1969)............. 25, 31, 34

Nichols & Co. v. Secretary of Agriculture, 131 F.2d 651 (C.A. 1, 1943).......................... 29, 33

O'Leary v. SEC, 424 F.2d 908 (C.A.D.C., 1970)........ 31, 34

Petroleum Exploration Inc. v. Public Service Commission, 304 U.S. 209 (1938)................. 35

Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).. 30

Page

Cases (continued):

Pierce v. SEC, 239 F.2d 160 (C.A. 9, 1956)........ 33

Quinn & Co. v. SEC, 452 F.2d 943 (C.A. 10, 1971), cert. denied, 406 U.S. 957 (1972)............ 31

Riss & Co. v. United States., 262 F.2d 245 (C.A. 8, 1958)................................ 24

Sardis Luggage Co. v. NLRB, 234 F.2d 190 (C.A. 5, 1956)...................................... 38, 40

SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963)................................ 19, 31

Jeffrey L. Silverman, CCH Commodity Fut. L. Rep. ¶10,159 (May 5, 1976), appeal pending, C.A. 7, No. 1 76-1469................................ 19

Sinclair v. SEC, 444 F.2d 399 (C.A. 2, 1971)....... 30

Douglas Steen, 21 A.D. 1076 (1962)................. 19

Tager v. SEC, 344 F.2d 5 (C.A. 2, 1965)............ 24, 30

The Siegel Trading Co., Inc., 29 A.D. 189 (1970)...................................... 19

Stirling v. Chemical Bank, 511 F.2d 1030 (C.A. 2, 1975)...................................... 3

William R. Thompson, Jr., 27 A.D. 335 (1968)....... 19

Th[illegible]n & Sloan Inc., 40 S.E.C. 451 (1961)........ 20

United States v. Benjamin, 328 F.2d 854 (C.A. 2), cert. denied, 377 U.S. 953 (1964)............. 25

United States v. Sarantos, 455 F.2d 877 (C.A. 2, 1972).................................... 25

United States ex rel. Castro-Louzan v. Zimmerman, 94 F. Supp. 22 (E.D. Pa., 1950)............... 41

United States ex rel. De Luca v. O'Rourke, 213 F.2d 759 (C.A. 8, 1954)..................... 39

Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951)...................................... 27

Page

Cases (continued):

Vanasco v. SEC, 395 F.2d 349 (1968)............... 31, 34

Virginia Petroleum Jobbers Assoc. v. Federal Power Commission, 259 F.2d 921 (C.A.D.C., 1958)...................................... 35

Volkart Bros. Inc. v. Freeman, 311 F.2d 52 (C.A. 5, 1962).............................. 21

Webb v. Finch, 431 F.2d 1179 (C.A. 6, 1970)....... 41

Edward Weitman, 30 A.D. 600 (1971)................ 19

Statutes and Rules:

Commodity Futures Trading Commission Act, Pub. Law 93-463, 88 Stat. 1389 (1974)................. 5

Section 411, 88 Stat. 1414 (1974)....... 8
Section 412, 88 Stat. 1414 (1974)....... 8

Commodity Exchange Act, as amended

Section 2(a)(1), 7 U.S.C. §2 (Supp. IV, 1974). 6
Section 4, 7 U.S.C. §6........................ 6
Section 4b, 7 U.S.C. §6b...................... passim
Section 4d(1), 7 U.S.C. §6d................... 6
Section 4e, 7 U.S.C. §6e...................... 6
Section 4k, 7 U.S.C. §6k...................... 6, 7, 28
Section 4m, 7 U.S.C. §6m...................... 6
Section 5, 7 U.S.C. §7........................ 6
Section 6(b), 7 U.S.C. §9..................... passim
Section 6(c), 7 U.S.C. §13b................... 2, 17, 24, 28
Section 8a(2)(B), 7 U.S.C. §12a(2)(B)......... 28

Administrative Procedure Act

Section 9(b), 5 U.S.C. §558.................. 24
Section 10(e), 5 U.S.C. §706 (1970).......... 27

Securities Exchange Act

Section 15(b), 15 U.S.C. §78o(b)............. 24

H.R. Rep. No. 93-975, 93d Cong., 2d Sess. (1974).. 19

S. Rep. No. 93-1131, 93d Cong., 2d Sess. (1974)... 19

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-4169

ROBERT HALTMIER,

Petitioner,

v.

COMMODITY FUTURES TRADING COMMISSION,

Respondent.

On Petition for Review of an Order of the
Commodity Futures Trading Commission

BRIEF OF THE COMMODITY FUTURES TRADING COMMISSION, RESPONDENT

COUNTERSTATEMENT OF THE ISSUES PRESENTED

1. Did the Commodity Futures Trading Commission properly find that futures transactions in commodities other than soybeans had not been authorized by a customer of a futures commission merchant, and had been effected by the account executive in willful violation of Section 4b of the Commodity Exchange Act, when (a) the customer testified in the administrative proceeding that he had authorized only transactions in soybean futures and (b) the account executive admitted that he had effected all transactions for the account during the relevant period, could point to no authority for having traded in futures other than soybeans, and ultimately admitted that these transactions had not been authorized?

2. Where the Commission, on an independent review of the record, found the evidence to show willful violations of the antifraud provision of Section 4b of the Commodity Exchange Act, may a reviewing court disturb the remedial sanction imposed where that sanction was clearly authorized by statute?

3. May a Commission decision be successfully attacked on the basis of bias and prejudice where the only factual errors in the Commission's opinion were immaterial and there was no substantial showing of a Commission purpose to reach a predetermined objective or that any element of the proceeding was designed to prevent, or did prevent, a fair hearing?

PRELIMINARY STATEMENT

Petitioner Robert Haltmier seeks review by this Court of an order entered by the respondent Commodity Futures Trading Commission on May 5, 1976 (a177-178).[1/] The order, entered pursuant to Sections 6(b) and 6(c) of the Commodity Exchange Act, as amended, 7 U.S.C. §§9 and 13b (Supp. IV, 1974), prohibits Mr. Haltmier from trading in commodity futures on or subject to the rules of any contract market for a period of eighteen months; it further directs

---

1/ "a__" refers to pages of the Appendix filed by the Commission with the Court. "T__" refers to pages of the transcript of the hearing held in the administrative proceeding before the Commission. "Ex__" refers to exhibits introduced in the proceeding. References to Mr. Haltmier's brief are cited as "Br.__".

him to cease and desist from unauthorized commodity futures transactions for the account of any customer and from otherwise cheating or defrauding any person in connection with orders for commodity futures contracts.[2/]

The Commission's order and accompanying opinion (a162-171) were issued at the conclusion of public proceedings that had been

---

2/ Judicial review of a Commission order refusing trading privileges may be obtained pursuant to Section 6(b), which provides in pertinent part:

> "Notice of such order shall be sent forthwith by registered mail or by certified mail or delivered to the offending person . . . . After the issuance of the order by the Commission, . . . the person against whom it is issued may obtain a review of such order . . . by filing in the United States court of appeals . . . a written petition, within 15 days after the notice of such order is given to the offending person, praying that the order of the Commission be set aside . . . . Upon the filing of the petition the court shall have jurisdiction to affirm, to set aside, or modify the order of the Commission . . . ."

A cease and desist order entered by the Commission under Section 6(c) is, under its provisions, "subject to appeal as in other cases provided for in [Section 6(b) of the Act] . . . ."

Mr. Haltmier has not filed a written petition with this Court as required by Section 6(b). Instead, by letter dated May 25, 1976, he notified the Commission of his intention to appeal the Commission's order of May 5 and requested that the administrative record be transmitted to this Court (a179). However, because Mr. Haltmier is appearing _pro se_, as he did in the administrative proceeding, and promptly _notified_ the Commission of his intent to appeal, the Commission does not urge dismissal of this appeal for failure strictly to comply with the statutory requirements. Nevertheless, Mr. Haltmier's failure to meet those requirements may be viewed as affecting the jurisdiction of this Court to consider his appeal. _Cf._, _Stirling_ v. _Chemical Bank_, 511 F.2d 1030 (C.A. 2, 1975). _For this reason, counsel for the_ Commission feels obliged to bring this matter to the Court's attention for whatever consideration, if any, the Court deems appropriate.

instituted on June 10, 1974, pursuant to an administrative complaint (a6-8) charging Mr. Haltmier with willfully having violated the antifraud provisions of Section 4b of the Commodity Exchange Act, 7 U.S.C. §6b. In particular, it was alleged (a7) that during the period from about April 18, 1972, to October 10, 1972, Mr. Haltmier had entered into 208 transactions for the commodity futures account of a customer, involving 690 contracts in various regulated commodities, without that customer's knowledge or authorization.

After a hearing held on January 16, 1975, the Administrative Law Judge ("ALJ") rendered a decision (a149-159). He found that Mr. Haltmier had willfully violated the antifraud provisions of Section 4b by making unauthorized trades in soybeans and other commodities as alleged in the complaint (a152, 154, 157). On this basis the ALJ concluded that remedial sanctions should be imposed, including an order that Mr. Haltmier cease and desist from further violations of the Act and an order denying him all trading privileges for a period of 5 years (a157-159).

Upon an independent review of the record, the Commission concurred in the ALJ's determination that Mr. Haltmier had willfully engaged in unauthorized transactions in violation of Section 4b of the Act (a166, 168). It modified the sanction imposed by the ALJ, however, to the extent of reducing the trading prohibition against Mr. Haltmier to 18 months (a170, 171). The Commission found that Mr. Haltmier had been given limited discretion to engage in certain transactions in soybean futures under a program outlined by the customer, that the customer's instructions were to trade only in soybeans and that no authority had been given to

Mr. Haltmier to trade in other commodities (a166, 167). On this basis, without reaching the question whether Mr. Haltmier had also violated the Act in connection with numerous soybean transactions, the Commission determined that the transactions he had effected in commodities other than soybeans were not authorized and had violated Section 4b (a167).

COUNTERSTATEMENT OF THE CASE

The Nature of the Administrative Proceeding Below

The Commodity Futures Trading Commission is an independent federal regulatory agency which began operation on April 21, 1975, pursuant to the Commodity Futures Trading Commission Act of 1974 ("CFTC Act"), Pub. L. 93-463, 88 Stat. 1389, which extensively amended the Commodity Exchange Act, 7 U.S.C. §1, et seq (Supp. IV, 1974). Prior to the 1974 amendments, the Commodity Exchange Act had been administered by the Commodity Exchange Authority of the Department of Agriculture, and applied to trading in certain specifically-enumerated agricultural commodities, such as those that are involved in the transactions in the instant case.[3/] The CFTC Act greatly expanded the coverage of the Commodity Exchange Act to encompass virtually all previously unregulated commodities and vested broad authority in the new Commission.

The main area of Commission responsibility relates to contracts of sale of commodities for future delivery traded or executed on boards of trade, i.e., commodity exchanges, that have

---

3/ In addition to soybeans, the case at bar involved the following commodities: wheat, cotton, soybean oil, Maine potatoes, and soybean meal.

been designated by the Commission as "contract markets" for specific commodity futures contracts.4/ It is unlawful to effect a commodity futures transaction otherwise than by or through a member of a board of trade that has been designated as a contract market by the Commission. Section 4 of the Act, 7 U.S.C. §6 (Supp. IV, 1974). In addition, futures commission merchants,5/ persons associated with futures commission merchants, and other professional participants in the futures markets must register with the Commission.6/

Like the Commodity Exchange Authority before it, the Commission is entrusted with enforcing the regulatory requirements and proscrip-

---

4/ A "board of trade" is defined in Section 2(a)(1) of the Commodity Exchange Act, 7 U.S.C. §2 (Supp. IV, 1974), as

> "any exchange or association, whether incorporated or unincorporated, of persons who shall be engaged in the business of buying or selling any commodity or receiving the same for sale on consignment."

In order to obtain designation as a contract market for a particular commodity futures contract, a board of trade must meet rigid requirements (see Section 5 of the Act, 7 U.S.C. §7 (Supp. IV, 1974)), and must continue, after designation, to maintain specific standards. See Section 5a of the Act, 7 U.S.C. §7a (Supp. IV, 1974).

5/ A "futures commission merchant" is defined in Section 2(a)(1) of the Act, 7 U.S.C. §2 (Supp. IV, 1974), as an individual or entity

> "engaged in soliciting or in accepting orders for the purchase or sale of any commodity for future delivery on or subject to the rules of any contract market and that, in or in connection with such solicitation or acceptance of orders, accepts any money, securities, or property (or extends credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom."

6/ See Sections 4d(1) (futures commission merchants), 4e (floor brokers), 4k (associated persons) and 4m (commodity trading advisors and pool operators) of the Act, 7 U.S.C. §§6d(1), 6e, 6k and 6m (Supp. IV, 1974). Prior to April 21, 1975, only futures commission merchants and floor brokers were required to register under the Act.

tions of the Act against registrants and other persons who are subject to the Act's provisions. Among the statutory prohibitions that the Commission must enforce is Section 4b, 7 U.S.C. §6b, which, at all relevant times, has made it unlawful, among other things, for "any member of a contract market . . . or employee of any member" or "any [other] person, in or in connection with any order to make, or the making of" any futures contract "for or on behalf of any other person . . . to cheat or defraud or attempt to cheat or defraud such other person . . . ."

If it should appear that any person has violated Section 4b or any other provision of the Act, Section 6(b), 7 U.S.C. §9, authorizes the institution of an administrative proceeding in which an order may be entered that, among other things, prohibits that person from trading on any contract market and directs all contract markets to refuse all trading privileges to him.[7/] In addition, at all relevant times, under Section 6(c) of the Act, 7 U.S.C. §13b, an order could be entered directing any person who has violated the Act to cease and desist from further violations.

The administrative proceeding which resulted in the order under review was originally initiated before the Secretary of

---

7/ As a result of the 1974 amendments to the Act, in order to be employed as an account executive with a futures commission merchant, a person is now required to be registered as an associated person of a futures commission merchant under Section 4k of the Act, 7 U.S.C. §6k. Also, Section 6(b) was amended to include associated persons among the categories of persons whose registration might be revoked or suspended in proceedings under Section 6(b). However, since Mr. Haltmier was not registered, and was not required to be registered, as an associated person at the time the Commission issued its order, the sanction of revocation or suspension of registration was not available and, accordingly, is not at issue in this proceeding.

Agriculture on June 10, 1974, and was based upon alleged violations by Mr. Haltmier of Section 4b. The Commission assumed jurisdiction of the proceeding pursuant to Sections 411 and 412 of the CFTC Act, 88 Stat. 1414, which respectively provide that "all pending administrative proceedings, shall be transferred to the Commodity Futures Trading Commission . . . and continue to completion," and that "[p]ending proceedings . . . shall be disposed of pursuant to the applicable provisions of the Commodity Exchange Act, as amended, in effect prior to the effective date of . . . [the CFTC Act]."

<u>The Evidence of Mr. Haltmier's Unauthorized Trading in Commodity Futures</u>

From early 1971 until the termination of his employment in September 1974, Robert Haltmier was employed as an account executive in the New York office of Conti-Commodity Services ("Conti"), which is a registered futures commission merchant and a member of the Chicago Board of Trade and other boards of trade that have been designated as contract markets for various commodity futures contracts (see n. 3, <u>supra</u>) (T13-14). Throughout that period, Mr. Haltmier was compensated by receiving a percentage of the commissions the firm charged for the execution of transactions made for the customer accounts he handled (T17-18).

In mid-March of 1972, the commodity futures trading account of one of Conti's customers--Albert Millet--was transferred to Mr. Haltmier from another account executive of the firm (a10-11). The account had been opened by Mr. Millet in January 1972 in order to trade in soybean futures, the only commodity with which Millet was familiar (a14-16).

For some time, Mr. Millet, an artist, had been watching the market in soybeans, studying crop reports and market movements as well as discussing the outlook with a friend, Mrs. Elizabeth Eastment (a15, 37, 40). Based upon his evaluation of the world economic situation and the lack of an available supply of other high-protein commodities, Mr. Millet anticipated the price of soybeans would rise and thereby expected to reap substantial profits by purchasing soybean futures (a34, 40). Consequently, after placing $5,000 in his account to provide margin for futures transactions he intended to effect (a13-14), Mr. Millet directed Jeffrey Silverman, the Conti account executive who was originally assigned to service his account, to purchase as many soybean contracts as possible with the money available.[8/] He specified that Mr. Silverman should purchase only contracts having a delivery date six or more months in the future and that Mr. Silverman should hold each contract for six months so that the anticipated profits could be taxed as a long term capital gain (a14, 40).

8/ "Margin" is the amount of money or property deposited by a customer with a futures commission merchant or by the futures commission merchant with a contract market's clearinghouse as a good faith deposit against possible loss on open futures contracts. Initial margin requirements that must be deposited at the time a futures contract is purchased, as well as a minimum percentage margin level that must be maintained until the contract is liquidated (see n. 10 supra), are periodically set by the board of trade for each commodity and delivery month for which the board of trade is designated as a contract market (see Ex9). If the market moves sufficiently against the customer's outstanding positions a "margin call" may be made requiring the customer to render additional funds to restore his deposit to the minimum percentage level that has been established.

Upon discovering that substantial trading activity in his account had occurred in commodities other than soybeans, Mr. Millet told Mr. Silverman to "get off the account" (a14). Thereafter, in March 1972, Conti discharged Mr. Silverman when the manager of his office became aware of a disturbing pattern of improper discretionary trading by Mr. Silverman for several of his customers (a10-11). As a result, Mr. Silverman's accounts were distributed among Conti's other account executives, and Mr. Haltmier advised Mr. Millet that Mr. Millet's account had been reassigned to Mr. Haltmier (a11, 16, 55).

Several days later, on March 16, 1972, Mr. Millet gave Mr. Haltmier explicit instructions with respect to his account (a17, 18). First, because of the account's confused state, Mr. Haltmier was told to liquidate all outstanding positions in the account (a17, 18). This was to enable Mr. Millet to ascertain how much he would have to place in the account to restore it to the original $5,000 and to begin again with his original program of buying soybean futures (a18).

In addition, consistent with his previous directions to Mr. Silverman, Mr. Millet instructed Mr. Haltmier to purchase as many soybean contracts having a delivery date of at least six months in the future as he could buy with the available $5,000, and to hold each of them for six months (a17). Mr. Millet also authorized Mr. Haltmier to make additional purchases of six-month soybean contracts if the market went up as he anticipated (a19). These further purchases were to be made from the increased equity in Mr. Millet's account that would result from appreciation in the value of the initial soybean contracts if the expected price rise occurred (a19).

Since he planned to depart shortly for an extended visit

to England and other European countries (a23, 24, 27), Mr. Millet further advised Mr. Haltmier that if funds were needed in his absence to meet a margin call of less than $500, Mr. Haltmier should request the money from Mrs. Eastment, who had been given a power of attorney over Mr. Millet's bank account (a22, 61, Ex4). If the sum required for margin was greater, Mr. Haltmier was directed to sell one or more of the initial soybean contracts and use the proceeds to margin the remainder of Mr. Millet's soybean position (a19-20).

Mr. Millet testified in the administrative proceeding that he had emphasized to Mr. Haltmier that he was not interested in "this nervous business of spreads,[9/] purchasing pork bellies and cocoa and whatever . . . ." (a14). Mr. Millet explained (a14) that he had "repeated" that he just wanted as many six-month soybean futures as his money would permit, and had stated "over and over again" to Mr. Haltmier that he was to sell a contract only if necessary to meet margin requirements.

In accordance with these instructions, Mr. Haltmier liquidated the open futures contracts in Mr. Millet's account on March 16 and 22,

---

9/ There are essentially two types of positions that may be taken in the futures markets. If a customer expects the market to rise, he may establish a "long" position in the market by purchasing a standardized quantity and quality of a commodity for future delivery in a particular month. The customer may also take a "short" position, in anticipation of a declining market, by selling the commodity for delivery in a specified month in the future.

A so-called "spread" may be established by acquiring a long position for a commodity in one delivery month and a corresponding short position in the same commodity in a different delivery month. While reducing the extent of profit that can be obtained from a favorable market movement, a spread also minimizes the risk of loss if market price movements are adverse to the investor.

1972 (a70, 72), thereby providing a cash balance of $3,090.75 (a74),[10/] and an additional $2,000 was transferred into the account by Mr. Millet (a76). Following an initial purchase for his account on March 27, 1972, of futures contracts for "November beans" (a141), Mr. Millet left New York on April 1, 1972, and did not return to the United States until October (a23, 31, Ex5). Before departing, however, he again contacted Mr. Haltmier, provided him with his address in England and requested that the monthly activity statements for his account (see Ex1) and any other communications from Mr. Haltmier be mailed to that address. On that occasion, Mr. Millet reiterated his instruction to Mr. Haltmier to trade only in soybeans (a24, 27).

In Mr. Millet's absence, Mr. Haltmier proceeded to engage in numerous trades (T7-8). Commencing on July 5, 1972, and continuing through September 15 of that year, Mr. Haltmier effected for Mr. Millet's account 53 separate transactions in futures involving commodities other than soybeans, including wheat, cotton, Maine potatoes, soybean oil and soybean meal (a88, 98, 100-106, 113-115, 117-118, 122, 126, 128, 130).[11/] A total of 98 non-soybean futures contracts were traded during this period. In every instance, the positions taken in these commodities were held by Mr. Haltmier for no more than

---

10/ An open futures contract is liquidated or closed out either by assuming an offsetting position in the futures market, or by making or taking delivery of the commodity in the delivery month. Delivery, however, is not normally made. Thus a long position for a particular delivery month is liquidated by entering a contract to sell an identical quantity of the commodity for the same delivery month; a short position is closed out by entering a contract to buy the commodity for delivery in the relevant month. Profit or loss is computed by netting the price of the long contract against the short contract.

11/ For the Court's convenience these transactions are summarized in Schedule I set forth <u>infra</u> at pp. S-1, <u>et seq.</u>

a few weeks before they were closed out. Most of the open positions either were closed out within a few days or the contracts were "day traded"--that is, petitioner both purchased and sold contracts in a particular commodity on the same day, thereby closing out, by the end of the trading day, part or all of the long or short position he had acquired for the account earlier in the day.[12/]

At the same time, Mr. Haltmier was also effecting scores of transactions involving hundreds of soybean futures contracts (T7-8. a77-116,118-141). For over four months, beginning on May 24, 1972, Mr. Haltmier traded soybean futures for Mr. Millet's account following a pattern similar to that involved with the non-soybean futures. Thus, notwithstanding Mr. Millet's long-term capital gain objectives, positions were repeatedly taken in soybean futures which were closed out several days later (see, e.g., a79-83, 85-91, 96-98, 104-108, 112, 114-115, 118-122, 126-127, 129, 130, 133-135, 140) and numerous day trades in soybeans were made (see, e.g., a77-78, 81-84, 90, 92-101, 103-106, 109, 111-112, 115-116, 122-123, 125-126, 128-130, 132-133, 139). A major portion of these trades involved the purchase of soybean contracts with delivery months less than six months in the future; many had a delivery month the same as or one month later than the month in which the purchase was made (e.g., September 1972 beans purchased on August 9, 1972) (see, e.g., a83-85, 88-89, 92-95, 100-101, 104-105). None were held for more than a few weeks. In addition, Mr. Haltmier established spreads against Mr. Millet's initial long November soybean position by taking short positions in soybeans having other delivery months (a79,

---

12/ See Schedule I, infra.

81-83, 85-87,89-91, 95, 97-98, 105, 119, 121-122, 126, 130, 133, 135, 140). These positions, similarly, were closed out soon after they were taken (id.). In all, over $8,000 in commissions were generated by these trades and charged to Mr. Millet's account (a77-141).

It was not until sometime in September, however, that Mr. Millet was alerted to the nature of the trading activity which had been effected for his account. While abroad, neither the monthly activity statements for the account (Ex1) nor the account's purchase and sale statements had been mailed to Mr. Millet's address in England, as he had directed Mr. Haltmier to do (a27). Instead, these statements were all sent to Mr. Millet's earlier mailing address in Syosset, New York--the address of Mrs. Eastment's home where Mr. Millet had received mail prior to leaving for England (a26, 41-42). Since Mrs. Eastment had also left for a summer vacation in Europe at the end of June 1972, these statements were held at the post office until her return in late August (a42).

Mr. Millet received no communication from Mr. Haltmier during this period other than a handwritten letter dated July 13, 1972 (a32, 101), which Mr. Millet testified he found to be illegible (a34). The letter, which requested Mr. Millet's ratification of a wheat spread being effected for his account (a145), was incorrectly addressed and was not actually received by Mr. Millet until August 19, since Mr. Millet had taken a tour of Italy and had not arrived back at his address in England until that date (a33).

When Mrs. Eastment returned to the United States, she initially assumed that the account statements she secured from the post office were duplicates of material which had been sent to Mr. Millet in England and discarded many of them (a42). Upon viewing several of the statements, however, she discovered that transactions in commodities other than soybeans had been effected and immediately wrote to Mr. Millet in England (a43). As a result, by letter to Conti's Executive Vice President dated September 12, 1972 (Ex3), Mr. Millet requested that all outstanding positions held in the account, except for the contracts in November soybeans, be closed out with the least possible loss. His account was liquidated on October 11, 1972 (a141), and on his return to the United States on October 29, Mr. Millet closed his account with Conti (a31).

Mr. Haltmier was questioned at the administrative hearing by the ALJ concerning whether Mr. Millet had authorized trades in commodities other than soybeans. He testified as follows (a52-53):

> "Q. . . . I'm interested in knowing what he [Mr. Millet] said to you that could be translated by you to make you . . . a responsible person, consider that you had authority to trade in other commodities. That's the whole nub of this case. That's what we're here for.
>
> A. Yes. Well, I don't think that he had completely ruled out trading in any other commodity and I sent him --
>
> Q. Stop right there. Why did you say that you didn't think he had ruled it out? What did he tell you that would lead you to believe that he hadn't ruled it out or that you believe he wanted you to expand? Did he simply come in and say, "Here's $5,000. Now, I think I'm going to make a million dollars in Soya Beans [sic], but if you see anything really good going around, trade it for my account"? Did you have that kind of authority?
>
> A. No.

> Q. Then what did he tell you that led you to believe that you could go beyond trading in Soya Beans [sic]? What would constrain you to say that you had latitude to trade in other commodities? What words did he use? What gave you that impression?
>
> A. I can't answer that. I don't -- I cannot say that he gave me some intentionally that I should go into other commodities. He did not say that.

Similarly, at the conclusion of the hearing, Mr. Haltmier gave the following testimony when asked by the ALJ if the transactions made in non-soybean futures could be justified even under Mr. Haltmier's claim (a60) that he had been given "some flexibility" to satisfy additional margin due to a decline in the soybean market without liquidating Mr. Millet's soybean position (a64-65):

> "JUDGE LIEBERT: . . . Now, why would it be necessary to go in at a subsequent date and buy long another commodity or sell short another commodity?
>
> THE WITNESS: That was not necessary, you are right.
>
> JUDGE LIEBERT: Why did you do that?
>
> THE WITNESS: I honestly thought that Mr. Millet would agree with the trade.
>
> JUDGE LIEBERT: And you did it hoping that if you made money he would be happy?
>
> THE WITNESS: Yes.
>
> JUDGE LIEBERT: And without thinking that you might lose money by doing it?
>
> THE WITNESS: You never think you are going to lose, I guess.
>
> JUDGE LIEBERT: And you recognize that was unauthorized?
>
> THE WITNESS: Yes.

The Commission's Decision

Based on these facts, the ALJ found that after the initial purchase of soybeans, all of the trades made by Mr. Haltmier for the account were without authorization (a152, 154, 157). The ALJ accordingly concluded that Mr. Haltmier willfully violated Section 4b of the Act (a154, 157). The Commission, on review, did not reach the question of whether the transactions in soybeans violated the Act. Noting that Mr. Millet's testimony showed that he had granted authority to Mr. Haltmier only with respect to the purchase of futures contracts in soybeans and that Mr. Haltmier had acknowledged that he had received no specific authority to trade in commodities other than soybeans (a166), the Commission found that petitioner's trades for Mr. Millet's account in non-soybean futures were unauthorized (a167).

The Commission held that such unauthorized trading for the account of a customer constituted cheating or defrauding within the meaning of Section 4b and that the violations were willful in that Mr. Haltmier intentionally engaged in acts which were prohibited by law or acted with careless disregard of statutory requirements (a167).

The Commission imposed remedial sanctions upon Mr. Haltmier, including a denial of all trading privileges for a period of 18 months. The Commission stated (a168):

> "the Act imposes a high degree of trust on those engaged in trading activity with customer's funds, and in this instance, . . . [Mr. Haltmier's] activities breach that trust by disregarding Millet's instructions."

STATUTE INVOLVED

Section 4b of the Commodity Exchange Act, 7 U.S.C. §6b, provides in pertinent part:

> "It shall be unlawful (1) for any member of a contract market, or for any correspondent, agent, or employee of any member, in or in connection with any order to make, or the making of any contract of sale of any commodity in interstate commerce, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person, or (2) for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person . . .
>
> (A) to cheat or defraud or attempt to cheat or defraud such other person . . . ."

ARGUMENT

I. PETITIONER WILLFULLY VIOLATED THE ANTIFRAUD PROVISIONS OF THE COMMODITY EXCHANGE ACT BY ENGAGING IN UNAUTHORIZED COMMODITY FUTURES TRADING FOR THE ACCOUNT OF HIS CUSTOMER; MINOR ERRORS IN THE COMMISSION'S DECISION WERE NOT MATERIAL OR PREJUDICIAL.

Section 4b is designed to protect against any type of overreaching by a futures commission merchant or one of its employees in the handling of its customer accounts. The proscriptions against cheating and other fraudulent and deceptive activities contained in that section specifically relate to commodity futures transactions which are effected by any person "for or on behalf of any other person." Consistent with the remedial objectives of the Act in general,[13/] and of Section 4b in particular,[14/] it has long been recognized by the Commission's predecessor agency in the Department of Agriculture,[15/] and by the Commission itself[16/] that unauthorized trading by a commodities broker for the account of a

13/ The legislative history of the recent amendments to the Commodity Exchange Act makes clear that one of the Act's fundamental purposes is to assure "fair practices and honest dealing" in commodity futures. S. Rep. No. 93-1131, 93d Cong., 2d Sess. 14 (1974); accord, H. R. Rep. No. 93-975, 93d Cong., 2d Sess. 35 (1974). Of particular concern to Congress has been the existence, among other things, of fraud, " . . . cheating of customers and other sharp practices not easily discoverable by the victims." H. R. Rep. No. 93-975, 93d Cong., 2d Sess. 34 (1974).

14 See Hecht v. Harris, Upham & Co., 283 F. Supp. 417 (N.D. Cal., 1968) modified on other grounds 430 F.2d 1202, (C.A. 9, 1970); cf., Affiliated Ute Citizens v. United States, 406 U.S. 128, 151 (1972); Securities and Exchange Commission v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 195 (1963).

15/ George Rex Andrews, 32 A.D. 553 (1973); Elliott Alkow, 31 A.D. 1353 (1972); Edward Weitman, 30 A.D. 600 (1971); Rodger Harris, 29 A.D. 1330 (1970); The Siegel Trading Company, Inc., 29 A.D. 189 (1970); William R. Thompson, Jr., 27 A.D. 335 (1968); Douglas Steen, 21 A.D. 1076 (1962).

16/ Jeffrey L. Silverman, CCH Comm. Fut. L. Rep. ¶20,159 (May 5, 1976), appeal pending, C.A. 7, No.1 76-1469.

customer is a violation of Section 4b.[17/]

Mr. Haltmier does not appear to dispute that, if the futures transactions he entered for Mr. Millet's account were not authorized, he violated Section 4b. And the Commission's finding that Mr. Haltmier's transactions in commodities other than soybeans had been made without authorization is supported by the weight of the evidence.[18/] The evidence adduced in the proceeding, including that offered by Mr. Haltmier, was entirely in accord on two critical facts: (1) that Mr. Haltmier effected transactions in non-soybean futures for Mr.

17/ See also McCurnin v. Kohlmeyer & Co., 340 F. Supp. 1338 (E.D. La., 1972), aff'd, 477 F.2d 113 (C.A. 5, 1973); cf., Johnson v. Arthur Espey, Shearson, Hammil & Co., 341 F. Supp. 764 (S.D.N.Y. 1972); Booth v. Peavey Co. Commodity Services, 430 F.2d 132 (C.A. 8, 1970); Hecht v. Harris, Upham & Co., 283 F. Supp. 417 (N.D. Cal., 1968), modified on other grounds, 430 F.2d 1202 (C.A. 9, 1970). The Securities and Exchange Commission has similarly concluded that unauthorized securities transactions executed by a stock broker for customer accounts violate comparable antifraud provisions of the federal securities laws. See, e.g., J. Logan & Co., 41 S.E.C. 88, 92, 98 (1962), aff'd per curiam sub. nom. Hersh v. Securities and Exchange Commission, 325 F.2d 147 (C.A. 9, 1963), certiorari denied, 377 U.S. 937 (1964); Thompson & Sloan, Inc., 40 S.E.C. 451, 454 (1961).

18/ Section 6(b) of the Commodity Exchange Act, which confers authority on this Court to review Commission orders, provides that "the findings of the Commission as to the facts, if supported by the weight of evidence, shall . . . be conclusive." The courts have defined the term "weight of evidence" in Section 6(b) as meaning "the preponderance" or "greater weight of the evidence." See, e.g., Kent v. Hardin, 425 F.2d 1346, 1349 (C.A. 5, 1970); G. H. Miller & Co. v. United States, 260 F.2d 286, 288 (C.A. 7, 1958), certiorari denied, 359 U.S. 907 (1959); General Foods Corp. v. Brannan, 170 F.2d 220, 224 (C.A. 7, 1948). Furthermore, as the court noted in Great Western Food Distributors, Inc. v. Brannan, 201

(footnote continued)

Millet's account, and (2) that no instructions were given by Mr. Millet to Mr. Haltmier authorizing trades in commodities other than soybeans.

At the outset of the administrative hearing it was stipulated (T7-8) that Mr. Haltmier had effected all of the transactions in both soybean and non-soybean futures for Mr. Millet's account from April 18, 1972 to October 11, 1972. It was also undisputed that, except with respect to the initial purchase of soybean contracts on March 27, Mr. Haltmier had never received express directions from Mr. Millet specifically to effect any of the transactions Mr. Haltmier entered for Mr. Millet's account (a17, 19-20, 50, 53, 59, 64-65).

18/ (footnote continued)

F.2d 476, 479-480 (C.A. 7), certiorari denied, 345 U.S. 997 (1953):

> "[T]he function of this court is something other than that of mechanically reweighing the evidence to ascertain in which direction it preponderates; it is rather to review the record with the purpose of determining whether the finder of fact was justified, i.e., acted reasonably, in concluding that the evidence, including the demeanor of the witnesses, the reasonable inferences drawn therefrom and other pertinent circumstances supported his findings."

Accord, Cargill, Inc. v. Hardin, 452 F.2d 1154, 1163 (C.A. 8, 1971), certiorari denied, 406 U.S. 932 (1972); Goodman v. Benson, 286 F.2d 896, 899-900 (C.A. 7, 1961); Volkart Bros. Inc. v. Freeman, 311 F.2d 52 (C.A. 5, 1962). Thus, under the weight-of-evidence test, it is the responsibility of the Commission, rather than a reviewing court, to resolve conflicts in and the credibility of testimony, and to draw inferences from the record. Goodman v. Benson, supra, 286 F.2d at 900.

Nor had Mr. Haltmier been given general authority, in his discretion, to effect trades in commodities other than soybeans. As we have seen, see pp. 10-11 supra, Mr. Millet testified that he had emphasized to Mr. Haltmier his lack of interest in trading in non-soybean futures and that he had expressly instructed Mr. Haltmier to trade only in soybeans since that was the only commodity of which Mr. Millet possessed knowledge. There is nothing in the record to controvert this testimony. Mrs. Eastment's testimony tended to confirm that of Mr. Millet: she stated that Mr. Millet's familiarity with commodities was limited to the market in soybeans, and that she had been surprised when she noticed that Mr. Millet's account statements reflected trades in non-soybean contracts (see p. 15, supra).19/

Indeed, as we noted above pp. 15-16, Mr. Haltmier himself testified that Mr. Millet had not affirmatively told him that he could trade in non-soybean futures, and he was unable to explain what statements Mr. Millet had made which might have given him the impression

---

19/ Mr. Haltmier's lack of discretionary authority to trade in commodities other than soybeans is further demonstrated by the fact that under Conti's standing policy, of which Mr. Haltmier was aware (a57-58), authorization for a "discretionary account" had to be given in writing, and accounts involving less than $10,000 would not be approved for discretionary trading (T20-21). Mr. Millet's account consisted of little more than $5,000 and he had signed no authorization for discretionary trading. Moreover, in a letter Mr. Haltmier sent to Mr. Millet dated July 13, 1972, Mr. Haltmier discussed what he termed a "low-risk . . . wheat spread" for which he sought specific approval (a54; see p. 14, supra). Had Mr. Haltmier believed that he had been given discretionary authority to trade in commodities other than soybeans for Mr. Millet's account, he would not have sought ratification--which he never received--of such a "low-risk" trade.

that he could make those trades (a53). Although Mr. Haltmier claimed that he had been given some latitude in executing transactions to protect Mr. Millet's initial soybean position in a declining market, he conceded that his trades in non-soybean futures were "not necessary" to that end, and ultimately admitted that they had in fact been "unauthorized" (a64-65).[20/]

20/ Even though the Commission in its opinion did not discuss the ALJ's conclusion that Mr. Haltmier's transactions involving soybeans were not the type of transactions that had been authorized, and thus also violated Section 4b, there is ample evidence in the record to sustain the ALJ's finding to that effect. As we have shown, supra pp. 12-14, numerous transactions were effected that were patently inconsistent with Mr. Millet's instructions that, if the market in soybeans rose, Mr. Haltmier was to purchase soybean futures with delivery dates at least six months away and to hold those positions for six months before selling. These transactions were similarly inconsistent with Mr. Millet's instructions that, if the market price for soybeans declined, and thus additional margin was needed, Mr. Haltmier could obtain an amount up to $500 from Mrs. Eastment and, if more was needed, should liquidate one or more of his outstanding soybean contracts.

Mr. Haltmier sought to justify these soybean transactions on the ground that the market price for soybeans was declining and he believed he had authority to "hold on" unless the market price for soybeans declined to a certain level (which he did not specify), at which point he was to liquidate all of Mr. Millet's soybean positions (a51). Mr. Haltmier admitted, however, that he had been instructed to obtain additional funds from Mrs. Eastment to meet margin requirements and that he had ignored that instruction (a61). Moreover, Mr. Haltmier's pattern of trading was inconsistent with the authority he claims to have been given. Assuming that, to satisfy additional margin requirements in a declining market, Mr. Haltmier had been given authority to establish spreads against the initial November soybean position, rather than to liquidate one or more of those positions, there could have been no occasion at the same time to take long positions in other soybean futures. Nor could there be any justification to establish a spread by going short and then liquidating that short position on the same day, since this would have no effect on the margin needed to maintain the initial November soybean positions.

In these circumstances, petitioner's unauthorized trading can hardly be claimed to have been inadvertent. He engaged in numerous transactions in commodities other than soybeans which he knew to be unauthorized. The evidence reflects, at a minimum, a careless disregard for his statutory responsibility under Section 4b.[21/] Even if it were

---

21/ Section 4b of the Act does not require willful cheating or defrauding in order that a violation be proved. Nor do Sections 6(b) or 6(c), pursuant to which these proceedings were brought, impose a requirement that violations of the Act must be willful before the Commission may issue an order imposing remedial sanctions. Nevertheless, the Commission expressly found petitioner violations to have been willful. Section 9(b) of the Administrative Procedure Act, 5 U.S.C. §558, requires a finding of willfulness in certain circumstances before remedial action may be taken, and it is arguable that Section 9(b) may apply to the instant matter.

It is well settled for purposes of the Commodity Exchange Act and other remedial statutes that

> ". . . if a person (1) intentionally does an act which is prohibited,--irrespective of evil motive or reliance on erroneous advice, or (2) acts with careless disregard of statutory requirements, the violation is wilful."

Goodman v. Benson, supra, 286 F.2d at 900; accord, e.g., George Steinberg and Son, Inc. v. Butz, 491 F.2d 988, 994 (C.A. 2,), certiorari denied, 419 U.S. 830 (1974); Eastern Produce Co. v. Benson, supra, 278 F.2d at 609; cf., Riss & Co. v. United States, 262 F.2d 245, 250-251 (C.A. 8, 1958). This standard of willfulness has invariably been applied to administrative proceedings of the Securities and Exchange Commission for revocation of the registration of broker-dealers under the Securities Exchange Act, 15 U.S.C. §78o(b), whose functions in the securities markets are substantially similar to the functions of futures commission merchants in the commodity futures markets. For example, this Court stated in Tager v. Securities and Exchange Commission, 344 F.2d 5, 8 (C.A. 2, 1965):

> "It has been uniformly held that 'willfully' in this context means intentionally committing the act which constitutes the violation. There is no requirement that the actor also be aware that he is violating one of the Rules or Acts."

(footnote continued)

assumed, as Mr. Haltmier asserted, that he "did not think" that Mr. Millet had ruled out trading in non-soybean contracts (a52), but that he might have been "mistaken" as to the instructions given him by Mr. Millet (a59), it was incumbent upon him to clarify the scope of his authority. The best that can be said is that Mr. Haltmier deliberately closed his eyes to the fact that he might be engaging in unlawful conduct. United States v. Sarantos, 455 F. 2d 877, 881 (C.A. 2, 1972); United States v. Benjamin, 328 F. 2d 854, 863 (C.A. 2), certiorari denied, 377 U.S. 953 (1964).

Notwithstanding the overwhelming case against him, Mr. Haltmier challenges the sufficiency of the evidence upon which the Commission based its determination that he had engaged in unauthorized trading for Mr. Millet's account. He primarily contends that various factual findings of the Commission are erroneous (see Br.2-7). While Mr. Haltmier correctly points out that the opinions of both the Commission and the ALJ contained certain factual errors, however, the inaccuracies which he cites are immaterial to the issues decided by the Commission and are in no way prejudicial to Mr. Haltmier.

Thus, while the record establishes that Mr. Haltmier initially purchased seven November soybean contracts for Mr. Millet's account on March 27, 1972 (a75, 141), Mr. Haltmier notes (Br.4) that the Commission stated (a163) that only two soybean contracts had been purchased on that date.

21/ (Footnote continued)

Accord: Jaffee & Company v. Securities and Exchange Commission, 446 F.2d 387, 392 (C.A. 2, 1971); Nees v. Securities and Exchange Commission, 414 F.2d 211, 221 (C.A. 9 1969).

But no charge was made or proven in the administrative proceeding which challenged Mr. Haltmier's authority to effect the initial purchases of soybean futures for Mr. Millet's account. The issue before the Commission was whether subsequent transactions effected by Mr. Haltmier had been authorized or not. Accordingly, the Commission's erroneous statement as to the number of soybean contracts purchased on March 27 could in no way have influenced its finding of violations or prejudiced Mr. Haltmier.[22/]

The Commission similarly committed harmless error when it stated that the margin requirement on March 27, 1972, was $1,000 and that the margin requirement remained the same throughout the subsequent period during which the unauthorized trades took place. As Mr. Haltmier correctly notes (Br.2), the margin requirement on March 27 was $750 per soybean contract. But on the very next day--March 28, 1972--margin requirements for soybean contracts increased to $1,000 per contract and were at that level throughout the entire period from July 13, 1972, to September 15, 1972, when Mr. Haltmier was found by the Commission to have effected unauthorized transactions in futures other than soybeans.

22/ Mr. Haltmier urges (Br.4-5) that this error somehow represents a serious inadequacy in the Commission's decision. It is, however, readily explainable. The confusion with respect to the number of soybean contracts initially purchased arose because those purchases were reflected on two separate account statements. One indicated that five contracts had been purchased on March 27 (see a141); the other reflected separate purchases of two additional contracts on that date (see a75). While Mr. Haltmier claims that five contracts were purchased on March 27, 1972 (Br.2, 4), the record shows that a total of seven contracts were purchased for the account on that date.

In these circumstances, the Commission's mistake of a single day concerning the date upon which the higher margin requirement had gone into effect is a trivial error of no possible consequence.

Minor factual errors of the kind noted by Mr. Haltmier, through which no prejudice was or could be established, do not afford a basis to overturn an agency's order. Communist Party v. Control Board, 367 U.S. 1, 67 (1961); Braniff Airways, Inc. v. Civil Aeronautics Board, 379 F.2d 453, 466 (C.A.D.C., 1967). An administrative decision must be evaluated on the basis of the totality of the circumstances in the record and not upon isolated instances of erroneous factual findings not pertinent to the material issues in the case. Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 491 (1951). See also Section 10(e) of the Administrative Procedure Act, 5 U.S.C. §706.

II. THE REMEDIAL SANCTIONS IMPOSED UPON PETITIONER WERE WELL WITHIN THE COMMISSION'S DISCRETION.

Where it has been shown "[u]pon evidence received," that "any person . . . is violating or has violated any of the provisions of . . . [the Commodity Exchange] Act . . . ," the Commission is authorized under Section 6(b) of that Act to

> "prohibit . . . [that] person from trading on or subject to the rules of any contract market and require all contract markets to refuse such person all trading privileges thereon for such period as may be specified in the order . . . ."

Similarly, proof of violation of "any of the provisions of this Act . . ." after "notice and hearing" permits the the Commission, pursuant to Section 6(c), to "make and enter an order directing that such person shall cease and desist therefrom . . . ."

Here, the Commission directed Mr. Haltmier to cease and desist from further violations of Section 4b and prohibited him from trading for a period of 18 months. Since the Commission found, on the basis of evidence adduced at an administrative hearing, that Mr. Haltmier had willfully violated Section 4b of the Commodity Exchange Act, the statutory prerequisites for the imposition of these remedial sanctions were met.[23/]

23/ The Commission reduced the sanction imposed by the ALJ, who had ordered a trading ban of five years duration. The Commission (a170) considered this sanction excessive since, as a result of the 1974 amendments to the Act, Mr. Haltmier would henceforth be required to register under Section 4k of the Act, 7 U.S.C. §6k (Supp. IV, 1974) as an "associated person" of a futures commission merchant before he could resume employment as an account executive. Thus, the Commission would have the opportunity to consider, upon Mr. Haltmier's application for registration, whether he was at that time unfit to participate in commodity-related activities. Mr. Haltmier could then demonstrate rehabilitation. See Section 8a(2)(B) of the Act, 7 U.S.C. §12a(2)(B).

In _American Power & Light Co._ v. _Securities and Exchange Commission_, 329 U.S. 90, 112-113 (1946) (emphasis added), the Supreme Court enunciated the standard for judicial review of an agency's determination of the appropriate remedial sanction:

> "It is a fundamental principle . . . that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence.' . . . While recognizing that the [Securities and Exchange] Commission's discretion must square with its responsibility, _only if the remedy chosen is unwarranted in law or is without justification in fact should a court attempt to intervene in the matter_."

This "fundamental principle" has repeatedly been applied by the courts in upholding sanctions--including the denial of trading privileges and cease and desist orders--in cases involving the implementation of policy under the Commodity Exchange Act and other federal regulatory statutes dealing with commodities. _See, e.g._, _Butz_ v. _Glover Livestock Commission Co._, 411 U.S. 182, 185-186 (1973); _Goodman_ v. _Benson_, 286 F.2d 896, 900-901 (C.A. 7, 1961); _Eastern Produce Co._ v. _Benson_, 278 F.2d 606, 610 (C.A. 3, 1960); _G.H. Miller & Co._ v. _United States_, 260 F.2d 286, 295-297 (C.A. 7, 1958) (_en banc_), _certiorari denied_, 359 U.S. 907 (1959); _Great Western Food Distributors_ v. _Brannan_, 201 F.2d 476, 484 (C.A. 7, 1953); _Nichols & Co._ v. _Secretary of Agriculture_, 131 F.2d 651, 659 (C.A. 1, 1943).

As the Court of Appeals for the Seventh Circuit held in a case involving remedial sanctions imposed under the very provision

of the Commodity Exchange Act which is involved in the instant case:

> "It is . . . clear to us that if the order of an administrative agency finding a violation of a statutory provision is valid and the penalty fixed for the violation is within the limits of the statute the agency has made <u>an allowable judgment in its choice of the remedy</u> and ordinarily the Court of Appeals has no right to change the penalty because the agency might have imposed a different penalty."

<u>G.H. Miller & Co.</u> v. <u>United States</u>, <u>supra</u>, 260 F.2d at 296 (emphasis in original). Similarly, in reviewing an order of the Securities and Exchange Commission, which had revoked the registration of a securities broker, this Court stated:

> "Registration of broker-dealers is a means of protecting the public . . . , and the determination of the sanctions necessary to protect the public rests primarily within the competence of the Commission . . . . The Commission must have a very large measure of discretion in determining what sanctions to impose at a particular time in particular cases. Failing a gross abuse of discretion, the courts should not attempt to substitute their untutored views as to what sanctions will best accord with the regulatory powers of the Commission."

<u>Tager</u> v. <u>Securities and Exchange Commission</u>, 344 F.2d 5, 8-9 (C.A. 2, 1965). <u>Accord</u>, <u>Federal Trade Commission</u> v. <u>Universal-Rundle Corp.</u>, 387 U.S. 244, 250 (1967); <u>Moog Industries, Inc.</u> v. <u>Federal Trade Commission</u>, 355 U.S. 411, 413-414 (1958); <u>Phelps Dodge</u> Corp. v. <u>National Labor Relations Board</u>, 313 U.S. 177, 194 (1941); <u>Sinclair</u> v. <u>Securities and Exchange Commission</u>, 444 F.2d 399 (C.A. 2, 1971); <u>Gross</u> v. <u>Securities and Exchange Commission</u>, 418 F.2d 103, 107-108

(C.A. 2, 1969); Fink v. Securities and Exchange Commission, 417 F.2d 1058, 1060 (C.A. 2, 1969); Vanasco v. Securities and Exchange Commission, 395 F.2d 349, 353 (C.A. 2, 1968). 24/

Mr. Haltmier attacks the remedial sanctions imposed by the Commission on a number of grounds. First, Mr. Haltmier asserts (Br. 16) that the trading prohibition, although reduced from that which the ALJ had proposed, see supra p. 4, is nevertheless excessive because, he claims, the Commission has "frequently" suspended individuals for much shorter periods of time. But Mr. Haltmier has not cited any case in which the Commission or its predecessor agency imposed a substantially lesser sanction for comparable violations

---

24/ Lawrence v. Securities and Exchange Commission, 398 F.2d 276, 280 (C.A. 1, 1968); Armstrong-Jones & Co. v. Securities and Exchange Commission, 421 F.2d 359, 365 (C.A. 6), certiorari denied, 398 U.S. 958 (1970); Nees v. Securities and Exchange Commission, 414 F.2d 211, 217 (C.A. 9, 1969); Quinn & Co. v. Securities and Exchange Commission, 452 F.2d 943, 947 (C.A. 10, 1971), certiorari denied, 406 U.S. 957 (1972); O'Leary v. Securities and Exchange Commission, 424 F.2d 908, 912 (C.A. D.C., 1970); Arrow Metal Products Corp. v. Federal Trade Commission, 249 F.2d 83, 85 (C.A. 3, 1957; Eastern Produce Co. v. Benson, 278 F.2d 606, 610 (C.A. 3, 1960).

Judicial decisions under the federal securities laws, such as those cited above, have recently been recognized to be of particular significance in delineating the scope of the Commission's authority where comparable provisions of the Commodity Exchange Act are involved. Commodity Futures Trading Commission v. J.S. Love & Associates Options, Ltd., CCH Comm. Fut. L. Rep. ¶20,198 at p. 21,105 (S.D.N.Y., 1976). This is because in "every facet" of the commodity industry, no less than the securities industry, "it is 'essential . . . that the highest ethical standards prevail.'" Securities and Exchange Commission v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186-187 (1963), as quoted in J.S. Love, supra, at pp. 21,105.

under similar circumstances.[25/] Even if Mr. Haltmier could point to such an instance, however, that would afford no basis for setting aside the Commission's order. The Court of Appeals for the Seventh Circuit in G.H. Miller, supra, 260 F.2d at 296, considered an argument identical to that made by Mr. Haltmier; it simply observed:

> "The petitioners . . . insist that the penalty here is more severe than any penalty imposed upon any other violator of the [Commodity Exchange] Act and cite cases where a lesser penalty was affixed. We are not impressed by such a specious argument." 26/

Indeed, the Supreme Court has expressly rejected the argument that a regulatory statute, such as the Commodity Exchange Act, mandates "uniformity of sanctions for similar violations." Butz v. Glover Livestock Commission, supra, 411 U.S. at 186. In that case, the Supreme Court reversed a decision which had overturned an agency order imposing sanctions exceeding those previously utilized for similar violations. The Supreme Court ruled (id. at 187) that

> "the employment of a sanction within the authority of an administrative agency is . . . not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases."

25/ Assuming, arguendo, that it could be shown that the Department of Agriculture, prior to the effective date of the CFTC Act, imposed lesser sanctions for comparable fraudulent activities, the Commission is in no sense bound by that policy. The Commission was not created to repeat what it may consider errors of the past but to formulate and implement an effective enforcement program for the future.

26/ Accord, Federal Trade Commission v. Universal-Rundle Corp., supra, 387 U.S. at 250, 251; Federal Communications Commission v. WOKO, 329 U.S. 223, 227-228 (1946); Hiller v. Securities and Exchange Commission, 429 F.2d 856, 858-859 (C.A. 2, 1970); Kent v. Hardin, 425 F.2d 1346, 1349 (C.A. 5, 1970); Dlugash v. Securities and Exchange Commission, 373 F.2d 107, 110 (C.A. 2, 1967).

Mr. Haltmier further contends (Br.15) that the sanction imposed by the Commission is "punitive," and claims (Br.17) that the severity of the sanction cannot be justified in view of the fact that Mr. Haltmier had committed no other misconduct in the past. It is well established, however, that sanctions imposed in an administrative proceeding are remedial, not punitive in nature, and are a "necessary power granted to the . . . [agency] to assure a proper adherence to the provisions of the [Commodity Exchange] Act." Eastern Produce Co. v. Benson, supra, 278 F.2d at 610. Accord, G.H. Miller, supra, 260 F.2d at 299; Nichols & Co., supra, 131 F.2d at 659; see also Pierce v. Securities and Exchange Commission, 239 F.2d 160, 163 (C.A. 9, 1956); Associated Securities Corp. v. Securities and Exchange Commission, 293 F.2d 738, 741 (C.A. 10, 1961).

Admittedly, proof of prior offenses would be a factor which may be considered by the Commission, in its discretion, in determining the choice of remedy. It does not follow from this, however, that the absence of previous violations converts a sanction that the Commission is authorized to impose, and which it considers an appropriate deterrent to future violations, into a sanction that is impermissibly "harsh" or "severe." The Commission recognized in its opinion (a170-171) that whether a person had consistently violated the Act on past occasions is but one of a number of factors that may be evaluated in fixing a period of suspension. Other matters, such as the gravity of the violations committed, are also pertinent to what period of suspension will be considered sufficient to achieve the purposes

of the Act. Consequently, in the Gross, Fink, Vanasco, Nees and O'Leary cases, cited supra at pp. 30-31, this Court and other courts of appeals have repeatedly found that the imposition by the SEC of the most severe sanctions available in broker-dealer proceedings under the securities laws--revocation of a broker-dealer's registration, or an absolute bar from association with a broker or dealer--were well within that agency's discretion to apply to persons who had not been shown to have committed any prior offenses.

Mr. Haltmier also insists that the Commission improperly ignored particular circumstances in the case at bar allegedly militating against an 18-month trading suspension. Specifically, he urges (Br.16) that, because of the pendency of the administrative proceeding, he has been unable to obtain employment since September 1974 and, consequently, was under a "de facto suspension" which has already caused him great economic hardship. But there is nothing in the record to support Mr. Haltmier's bald assertion before this Court that an alleged lack of gainful employment during this period was attributable to the proceeding. Moreover, while the Commission, as a responsible administrative agency, would be willing to cooperate in any reasonable attempt to minimize an unnecessary adverse impact of an administrative proceeding upon a respondent (so long as no adverse effect upon the public interest would result), private economic or financial loss which is engendered by the administrative process has never been considered a basis for avoiding the imposition of a remedy which is otherwise warranted by public policy.

In responding to a similar claim that imposition of administrative sanctions pending judicial review of an administrative decision would result in irreparable injury to the petitioners by excluding them from the securities business "and thus from earning their livelihoods in their chosen vocations," the Court of Appeals for the Tenth Circuit held in Associated Securities Corporation v. Securities and Exchange Commission, 283 F.2d 773, 775 (CA 10, 1960):

> "Serious as this personal injury may be, it is not of controlling importance as primary consideration must be given to the statutory intent to protect investors. Exclusion from the securities business is a remedial device for the protection of the public.
>
> In the balancing of injury to the individual by exclusion from the securit[ies] business and of harm to the public by proscribed activities in securit[ies] transactions the necessity of protection to the public far outweighs any personal detriment resulting from the impact of the applicable laws."

See also Virginia Petroleum Jobbers Association v. Federal Power Commission, 259 F.2d 921, 925 (C.A.D.C., 1958). Cf., Petroleum Exploration Inc. v. Public Service Commission, 304 U.S. 209, 222 (1938); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938).

Finally, there is no merit to petitioner's argument (Br.17-18) that the sanction ordered by the Commission bears no proper relationship to the violations committed. When the ALJ imposed a five-year trading prohibition, he found (a152, 154) that Mr. Haltmier had engaged in 208 transactions involving 690 contracts--in both soybeans and other commodities--which had not been authorized. On review of

the ALJ's decision, the Commission determined (a167) that Mr. Haltmier's trades in commodities other than soybeans were "clearly" unauthorized. From this, Mr. Haltmier infers (Br.12-14) that the Commission necessarily found that his trades in soybeans had not violated the Act. But the Commission did not decide that Mr. Haltmier's soybean transactions had been authorized. Rather, the numerous unauthorized transactions in other commodities adequately demonstrated the violations of Section 4b that had been alleged. For this reason, it was wholly unnecessary for the Commission to discuss whether Section 4b had also been violated in connection with the soybean transactions.[27/] It follows that there is no merit to Mr.

27/ Mr. Haltmier (Br.14) attributes significance to what he claims is an inconsistency within the Commission's opinion: in one part of the opinion the Commission found that Mr. Haltmier's trades in commodities other than soybeans had been unauthorized (a167); in another part the Commission affirmed the ALJ's finding that Mr. Haltmier had, "as charged," violated Section 4b of the Act (a171). There is no inconsistency, however, between these two statements. The administrative complaint charged Mr. Haltmier with having violated Section 4b; in support of that charge it alleged that violations had occurred in 208 transactions involving 690 contracts. The ALJ determined that Mr. Haltmier had engaged in unauthorized trading with respect to all of those transactions and on that basis held that Mr. Haltmier had violated Section 4b. The Commission also found that the charge of violation of Section 4b had been sustained.

Haltmier's claims (Br.12) that the violations found were, for that reason, reduced by over 90%.

In any event, an appropriate sanction cannot be determined, as Mr. Haltmier suggests (Br.17), based solely upon the number of violations found to have been committed. Consideration must also be given to the nature of the violations. As to the latter, the Commission made clear the gravity of this case when it emphasized (a168) that by blatantly disregarding Mr. Millet's instructions, Mr. Haltmier had breached the high degree of trust imposed by the Commodity Exchange Act on those who trade with customers' funds. Mr. Haltmier's conduct did not involve an isolated violation of a technical nature which occurred during a brief period.[28/] To the contrary, Mr. Haltmier engaged in repeated, willful fraud against his customer during a period of more than four months. Unauthorized trades of the type effected by Mr. Haltmier conflict directly with the basic statutory purpose of assuring "fair and honest dealings" in commodities transactions and preventing abuses which "demoralize the markets." S. Rep. No. 93-1131, supra, at 14, 15.

28/ Even if under the Commission's reasoning Mr. Haltmier's unauthorized trades in non-soybean futures consisted of "19 transactions" involving "42 contracts," as Mr. Haltmier claims (Br.12), this is hardly evidence of an inadvertent violation. It would still fully support the sanction for willful violation of Section 4b that the Commission imposed. In any event, however, the record demonstrates beyond reasonable dispute that Mr. Haltmier engaged in 53 transactions in commodities other than soybeans in which some 98 contracts were traded (a88, 98,100-106, 113-115, 117-118, 122, 126, 128, 130). See Schedule I infra at p. S.1 et seq.

III. MR. HALTMIER WAS AFFORDED A FAIR AND IMPARTIAL HEARING BEFORE THE COMMISSION; NO BIAS OR PREJUDGMENT WAS EVIDENT NOR WAS MR. HALTMIER OTHERWISE PREJUDICED IN THE ADMINISTRATIVE PROCEEDING

Mr. Haltmier advances a series of arguments concerning the conduct of the administrative proceeding. Thus, Mr. Haltmier charges (Br.9,11) that the ALJ exhibited a bias in favor of Mr. Millet, whose testimony at the hearing was adverse to petitioner, and that the Commission sought to "cover up" the ALJ's partiality and lack of objectivity by distorting the facts and prejudging the case against petitioner on his appeal (Br.7).

It is recognized, however, that assertions "pregnant with inference, innuendo, and inapplicable . . . law" will not suffice to demonstrate bias in an administrative proceeding. Converse v. Udall, 262 F. Supp. 583, 590 (D. Ore., 1966), affirmed, 399 F.2d 616 (C.A. 9, 1968), certiorari denied, 393 U.S. 1025 (1969). Before a court will nullify an administrative decision on the basis of a charge of bias or prejudgment, there must be a "substantial showing" that the hearing officer possessed a "determined purpose to reach a predetermined end," or that the proceedings "were attended with suppressive and exclusionary rulings and actions, designed to prevent and preventing a fair hearing." Sardis Luggage Co. v. National Labor Relations Board, 234 F. 2d 190, 192 (C.A. 5, 1956); Continental Box Co. v. National Labor Relations Board, 113 F.2d 93, 96 (C.A. 5, 1940); Belsinger v. District of Columbia, 295 F. Supp. 159, 162 (D.D.C., 1969), rev'd on other grounds, 436 F.2d 214 (C.A.D.C., 1970). Accord, National Labor Relations Board v. Dennison Manufacturing Co., 419 F.2d 1080, 1085 (C.A. 1, 1969),

certiorari denied, 397 U.S. 1023 (1970); Hendrix Manufacturing Co. v. National Labor Relations Board, 321 F.2d 100, 103 (C.A. 5, 1963); United States ex rel. De Luca v. O'Rourke, 213 F.2d 759, 763 (C.A. 8, 1954). A mere showing that some minor errors had been made by the presiding officer--which is at most what has been shown in the instant case--does "not measure up to proof of a general attitude of bias, partiality or injudicious behavior." Hendrix, supra, 321 F.2d at 103.[29/]

Mr. Haltmier rests his claim of bias upon a conversation which occurred at the conclusion of the administrative hearing between the ALJ and Mr. Millet, who had appeared as a witness (see Br.10-11). The conversation took place in Mr. Haltmier's presence when those who had participated in the hearing gathered to await duplication of various exhibits. During a conversational interchange, the ALJ and Mr. Millet discovered that they had a mutual acquaintance and reminisced over their experiences with this person for whom both apparently had high regard. From this event, petitioner would have this Court infer that the ALJ's objectivity became so impaired as to have warranted a new hearing under a different ALJ. But there is nothing in the record that should occasion any serious question concerning the fairness of the ALJ's determination or of the Commission's review of the matter.

29/ In Hendrix, it had been shown that the hearing examiner had been unwilling to hear further argument on a motion, had limited the scope of counsel's cross-examination, and had commented unfavorably on the credibility of one of petitioner's witnesses. The court nevertheless rejected the charge of bias.

Mr. Haltmier points to the ALJ's finding that Mr. Millet's testimony was more credible than his own (Br.9). But that finding does not exhibit bias by the ALJ. Resolution of issues of credibility adverse to a party is no proof of bias unless the credited evidence is inherently unbelievable or the discredited evidence is irrefutably true--which is hardly the case here. See National Labor Relations Board v. Pittsburgh Steamship Co., 337 U.S. 656, 659-60 (1948); National Labor Relations Board v. Ebner Bros. Packers, 364 F.2d 565, 567 (5th Cir., 1966); Sardis Luggage Co. v. National Labor Relations Board, supra, 234 F.3d 190, 193 (C.A. 5, 1956).

Mr. Millet's testimony was not only believable but, as we have shown (see p. 12, supra), was corroborated in substantial measure by Mrs. Eastment's testimony as well as by the testimony of Mr. Haltmier himself. Mr. Haltmier testified that he had initially been instructed to purchase soybean contracts, to acquire additional contracts if the price of the futures increased (a50), to obtain necessary additional margin initially from Mrs. Eastment (a22, 50), and, if additional margin had been required, to liquidate the soybean positions (a50). This testimony coincided substantially with that given by Mr. Millet (see pp. 10-11, 22, supra), and not only confirms the credibility of Mr. Millet's

testimony, but also substantially refutes petitioner's assertion that Mr. Millet committed perjury at the hearing (Br.8).30/

Moreover, far from suggesting that Mr. Haltmier had been exploited because he had not been represented by counsel, as he now contends (Br.8), the record reveals that the ALJ made every effort to insure that Mr. Haltmier was accorded a fair hearing. The ALJ was plainly mindful that Mr. Haltmier had elected to appear pro se and that this imposed a duty of added care on the part of the presiding officer to assure the presentation of all relevant evidence. See Gold v. Secretary of Health Education & Welfare, 463 F.2d 38, 43-44 (C.A. 2, 1972); Webb v. Finch, 431 F.2d 1179, 1180 (C.A. 6, 1970); Coyle v. Gardner, 298 F. Supp. 609, 611, (D. Hawaii, 1968); United States ex rel. Castro-Louzan v. Zimmerman, 94 F. Supp. 22, 26 (E.D. Pa., 1950). On various occasions, the ALJ carefully explained the procedures that would be followed during the hearing and, noting

---

30/ In his brief (Br.8), Mr. Haltmier asserts that the Commission improperly refused to re-open the hearing and thus prevented him from demonstrating that Mr. Millet perjured himself on two occasions. However, in his appeal to the Commission, Mr. Haltmier, as purported evidence of perjury, referred only to that part of Mr. Millet's testimony in which Mr. Millet stated that he had met with petitioner in Conti's New York office sometime in March 1972 and at that meeting had given petitioner instructions concerning trading for his account (a16-17). Petitioner charged that this was an "outright unmitigated lie," claiming Mr. Millet had never visited Conti's office (Mr. Haltmier's brief on appeal to the Commission dated October 6, 1975, p. 20). Yet, in response to a question posed by the ALJ at the hearing, Mr. Haltmier admitted that he was "not sure" that Millet had not in fact visited him at Conti's office and, in any event, acknowledged that he had spoken with Mr. Millet concerning the account by telephone (a55). An inconsistency, if there was one, between the recollections of Mr. Haltmier and Mr. Millet as to whether their discussions took place in person or by telephone provides no basis for claiming that testimony was perjurious.

that Mr. Haltmier was not represented by counsel (T4, a46), advised Mr. Haltmier of his willingness to answer any question he might have as to any matter (T3, 63-64). Throughout the hearing the ALJ consistently offered helpful guidance to Mr. Haltmier, informing him of his opportunity to cross-examine witnesses (T39, 51-52; a45) and to adduce whatever evidence he desired in his defense (T42, a58, 62, 66-67; Ex8). As documentary evidence was introduced by the Commodity Exchange Authority attorney, the ALJ either directed that Mr. Haltmier be given a copy (T22-23) or, when no copy was immediately available, instructed counsel to obtain additional copies (a21).[31/] At the conclusion of the hearing, the ALJ explained, for Mr. Haltmier's benefit, the post-hearing procedures, including the purpose to be served by written filings and what should be included in them (a67, T115-117). Thus the record clearly reflects that the ALJ, far from exhibiting any bias or partiality adverse to Mr. Haltmier, made every effort to ensure that he received a fair and impartial hearing (T39, 42, 51-52, 89, 115-117, a37, 44-46, 58, 62, 66, 67; Ex8).

31/ There is no merit to Mr. Haltmier's claim (Br.10) that he was deliberately denied copies of exhibits 1-8. That he did in fact have access to the exhibits is indicated by the fact that his brief on appeal to the Commission, filed on October 8, 1975, contains a specific reference to exhibit 2 (a148).

CONCLUSION

For the foregoing reasons, the order of the Commission should be affirmed.

Respectfully submitted,

HOWARD SCHNEIDER
General Counsel

RICHARD E. NATHAN
Deputy General Counsel

FREDERIC T. SPINDEL
Associate General Counsel

JEFFREY J. MILTON
Attorney

Commodity Futures Trading Commission
2033 "K" Street, N.W.
Washington, D.C. 20581
(202) 254-9880

October 1976

SCHEDULE I
PETITIONER'S TRADES IN COMMODITIES OTHER THAN SOYBEANS
FOR THE ACCOUNT OF ALBERT MILLET
JULY 5, 1972 - SEPTEMBER 15, 1972

DATE	Contracts BOUGHT*	SOLD*	COMMODITY	PURCHASE AND SALE DATE
July 5	1		Aug. Soybean	
July 11		1	Oil	July 11 (a88)
August 1	2		Dec. Wheat	
		2		August 1 (a98)
July 13		2	Dec. Wheat	
August 3	2			August 3 (a100)
July 13	2		Sept. Wheat	
August 4		2		August 4 (a101)
August 4		2	Oct. Cotton	
		4		
	1			
	1			
	2			
	2			August 4 (a102)
August 7		1	Oct. Cotton	
		1		
	2			August 7 (a103)
August 7	2		Sept. Wheat	
August 8		2		August 8 (a104)
August 8	4		Sept. Wheat	
		4		August 8 (a104)
August 8	2		Dec. Wheat	
		2		August 8 (a104)

* Futures contracts in grains such as wheat are expressed in thousands of bushels on the "Statement[s] of Account Purchase and Sale." Each futures contract in grains involves 5,000 bushels. Thus 2 contracts would be expressed on the "Statement[s] of Account Purchase and Sale" as 10 i.e., 10,000 bushels.

TRADES IN COMMODITIES OTHER THAN SOYBEANS

DATE	Contracts BOUGHT	SOLD	COMMODITY	STATEMENT OF ACCOUNT PURCHASE AND SALE DATE
August 9		2	Oct. Cotton	
	1			
	1			August 9 (a105)
August 8		2	Sept. Wheat	
	4			
		2		August 10 (a106)
August 18		4	Dec. Soybean	
		1	Oil	
	5			August 18 (a113)
August 18	4		Oct. Cotton	
		3		
		1		August 18 (a113)
August 7		1	Dec. Wheat	
August 21	1			August 21 (a114)
August 7	1		Sept. Wheat	
August 22		1		August 22 (a115)
August 7	1		Sept. Wheat	
August 24		1		August 24 (a117)
August 23		1	May Maine Potatoes	
	1			August 24 (a117)
August 4	2		Dec. Soybean Meal	
August 25		2		August 25 (a118)
September 1	10		Sept. Wheat	
		10		September 1 (a122)
August 7		1	Dec. Wheat	
August 8	1			September 8 (a126)

TRADES IN COMMODITIES OTHER THAN SOYBEANS

DATE	Contracts BOUGHT	SOLD	COMMODITY	STATEMENT OF ACCOUNT PURCHASE AND SALE DATE
August 23	1		May Wheat	
September 13		1		September 13 (a128)
August 23	1		May Maine Potatoes	
September 15		1		September 15 (a130)